IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16/06/2004

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

SECOND APPEAL NO.535 OF 1993

1. Venugopal @ Alagarsamy (died)
2. A. Radha Manoharan
3. Sriramulu
4. Vemanna
5. A.Venkatesan
6. A.Kesavan
7. A.Kannan
8. A.Madhavan
9. Tmt.Ramabai
10.Tmt.Uma Vijaya

(Appellants 2 to 10 are
brought on record as LRs
of the deceased sole
appellant vide order dated
7.12.2004 made in CMP.Nos.
12800 to 12802/2003) ... Appellants

-Vs-

1. Bajanai Alagarsamy
2. Karuppiah @ Sambal ... Respondents

Second Appeal preferred under Section 100 C.P.C., praying for the relief as stated therein.

For Appellants : Mr. A. Sivaji

For Respondents : Mr. S. Krishnaswami

:JUDGMENT

This Second Appeal is preferred against the judgment and decree dated 29.7.2002 rendered in A.S.No.40 of 1991 by the Court Subordinate Judge, Srivilliputhur, thereby reversing the judgment and decree dated 5.3.1990 rendered in O.S.No.531 of 1988 by the Court of Principal District Munsif, Srivilliputhur.

2. Tracing the history of the above second appeal coming to be

preferred by the plaintiff in the suit, it comes to be known that the appellant herein has filed the suit for recovery of possession, permanent injunction restraining the defendants from further burrowing the schedule of properties and for such other reliefs.

3. The case of the plaintiff is that the plaintiff is the owner of the schedule mentioned properties and the defendants are making bricks and selling them; that the defendants approached the plaintiff for getting the schedule mentioned lands for making bricks; that on 14.11.1984, the plaintiff and the defendants entered into an agreement as per the terms of which, the defendants were entitled to remove earth from the suit property for a period of three and half years from 14.11 .1984; that the plaintiff received Rs.18,500/= as consideration on the same day from the defendants and the possession of the properties was handed over to the defendants; that according to the terms of the agreement, the defendants were entitled to burrow the land upto a depth of 2< feet and the defendants should not dig up more than 2< feet for any reason whatsoever and the defendants should entrust the possession of the schedule of properties to the plaintiff on 13.5.1988; that further when the defendants entrust the schedule of properties to the plaintiff, the land should be even without ditches or burrows and should be fit for cultivation; that from 14.5.1988 onwards, the plaintiff made repeated requests in person and through well-wishers, to hand back possession of the schedule of properties, but the defendants continued to excavate and make bricks upto the depth of 5 feet as the price of bricks rose all of a sudden; that the defendants were exploiting the land of the plaintiff in contravention of the agreement.

4. The further case of the plaintiff is that the defendants have violated the oral agreement by digging the land upto the foot of the palmyrah trees, whereas they have agreed to leave a radius of 6 feet around the palmyrah trees; that because of the action of the defendants, the two palmyrah trees are about to wither and fall; that the plaintiff is unable to perform agricultural operations in the schedule properties; that the loss due to non-performance of agricultural operations comes to about Rs.15,000/=; that the loss because of the withering of the palmyrah trees is estimated at Rs.8000/=; that the loss owing to the mining of the land more than the stipulated 2< feet works out to Rs.20,000/=; that the expenditure, the plaintiff will have to incur to make the land even and regular to make it suitable for cultivation is calculated at Rs.15,000/=; that the plaintiff issued a legal notice to the defendants enumerating all the losses accruing to the plaintiff; that the plaintiff in his notice dated 1.11.1988 had demanded Rs.43,000/= as loss sustained by him and Rs.15,000/=, if the defendants hand over possession in favour of the plaintiff without levelling the schedule of properties; that the defendants having received the legal notice on 3.11.1988 and 5.11.1988, sent a reply on 25.11.1988 with false allegations; that the plaintiff reserves his right to sue for damages and compensation from the defendants in a competent court of law in due course; that the defendants were causing irreparable loss and damage to the plaintiff by the continued possession of the schedule of properties which is contrary to the terms of the agreement and hence the suit.

5. On the contrary, the defendants would file a written statement, thereby denying all the allegations of the plaint and further submitting that they have scrupulously followed all the terms and conditions of the agreement dated 14.11.1984; that in fact, for the extension of the lease period, they have paid a sum of Rs.2,700/= to the plaintiff in the presence of one Bandari Perumal Chettiar; that the plaintiff has come forward with the false allegations in order to extract the money from the defendants herein; that the plaintiff is not entitled to claim damages; that in fact, the excavation of the land was stopped by the defendants even prior to the filing of the suit; that the cause of action alleged on the part of the plaintiff is false and fabricated one and on such averments, the defendants would pray to dismiss the suit with costs.

6. On such pleading by parties, the trial court would frame the following issues for determination of all the questions involved in the suit:

(1) Whether the plaintiff is entitled for the relief of possession ?

(2) Whether the plaintiff is entitled for the relief of permanent injunction ?

(3) Whether the cause of action as alleged by the plaintiff is true ?

(4) To what relief, if any, the plaintiff is entitled?

7. During trial, one witness by name Kesavan has been examined on the part of the plaintiff for oral evidence as P.W.1, besides marking four documents as Exs.A1 to A4 for documentary evidence. On the part of the defendants, the first defendant would examine himself as D.W.1 oral evidence, with no document having been marked on their side. The trial Court, in consideration of these materials placed on record and in appreciation of the evidence issue-wise in its own way, had ultimately decreed the suit with costs, testifying the validity of which, the defendants have preferred an appeal in A.S.No.40 of 1991 on the file of the Court of Sub Judge, Srivilliputhur and the said appellate Court having traced the facts and circumstances of the case as pleaded before the lower Court has framed the following point for consideration of the first appeal:
"Whether the appeal has to be allowed by setting aside the judgment and decree of the trial court?"
8. Thereupon, the appellate Court, having appreciated the evidence, both oral and documentary placed on record before the trial Court as aforementioned, would ultimately reverse the findings of the trial court thereby allowing the appeal. It is only challenging the said decree and judgment delivered by the first appellate Court, the plaintiff in the suit has come forward to prefer the above second appeal on certain grounds and at the time of admission, this Court has framed the following Substantial Questions of Law for determination of the above second appeal:

1. Whether the judgment of the lower appellate Court is in accordance with Order 41 Rule 31 C.P.C. ?

2. Whether the reversing judgment and decree of the lower appellate court is

sustainable on the facts and circumstances of the case when the lower appellate Court has not given any valid reason for reversing well considered judgment and decree of the trial Court?

3. Whether the lower appellate Court is right in rejecting the case of plaintiff, by accepting the case of defendants, where the respective cases were not analysed with reference in pleading and the available materials?

4. Has not the learned Sub Judge committed illegality in holding that Ex.A1 unregistered document cannot be looked into even for collateral purposes ?

9. During the pendency of the above second appeal, since the sole appellant/plaintiff died, his legal representatives were brought on record as appellants 2 to 10. During arguments, the learned counsel appearing on behalf of the appellants would submit that the agreement was entered into under Ex.A.1 adhering to which oral evidence has been let in by P.W.1; that the lower appellate Court has denied the very agreement entered into by the parties; that the lower appellate Court has not adhered to Order XL1 Rule 31 CPC which is mandatory, since no proper points have been framed for determination of the appeal by the lower appellate Court. At this juncture, the learned counsel would cite two judgments, the first one reported in (2001) 1 MLJ 1 (A.C. Lakshmipathy and another v. A.M.Chakrapani Reddiar and others); and the second judgment reported in 2003 (4) SCC 161 (Bondar Singh and others v. Nihal Singh and others).

10. In the first judgment cited above, it is held that 'the family arrangement which is compulsorily registerable, if not registered, the same can be looked into by the Court for collateral purpose.'

11. So far as the second judgment cited above is concerned, it is held therein that 'an unstamped and unregistered sale deed, though does not convey title to the vendee and not admissible in evidence, can be looked into for collateral purposes.' On such arguments, the learned counsel appearing on behalf of the appellants would seek to allow the above second appeal setting aside the judgment and decree passed by the lower appellate Court.

12. The learned counsel appearing on behalf of the respondents would lay emphasis on the point that within the three years period given under the agreement, he did not excavate enough materials as a result of which, it got extended by six more months; that however, on any account, Ex.A.1 is not a valid document for any consideration since it has been returned/retained for a period of three years; that an agreement could be entered into only for 11 months. At this juncture, the learned counsel would cite from a judgment delivered by this Court itself delivered in MATHURAM vs. ALAGU reported in 2003-4-L.W.289 wherein adopting the Division Bench Judgment delivered in LAKSHMIPATHY vs. CHAKRAPANI REDDIAR reported in (2001) 1 MLJ 1, this Court has held, pertaining to the question of allowing the unregistered sale deeds to be marked in evidence, that 'by the simple device of calling it as a collateral purpose, the party cannot be permitted to use the unregistered instrument, when the sale deed should have been registered as per law.' On such arguments, the learned counsel appearing on behalf of the respondents

would pray for dismissing the above second appeal with costs.

13. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both, while considering all the above substantial questions of law, particularly, relating to Order XL1 Rule 31 CPC, and the vital document Ex.A.1 unregistered instrument, if a decision has to be rendered by this Court, from the pleadings of both the parties before the lower Courts, it is an admitted fact that the defendants themselves entered into an agreement for excavating the earth from the particular property belonging to the plaintiff. What they come forward to plead is that in spite of a term of three years has been allocated under Ex.A.1 agreement on certain conditions, they were not able to operate all the times, as a result of which on payment of a further sum of Rs.2,700/- to the plaintiff in the presence of one Pandari Perumal Chettiar, the term of the instrument was extended further and, therefore, there is no doubt in the agreement entered into in between both the parties for leasing out the properties as it has been done on mutual consent and on certain terms and conditions which have been not at all denied by the defendants in their written statement. In fact, so far as the factual case of the plaintiffs, as put up before the trial Court is concerned, it is an admitted case of the defendants also including the execution of Ex.A.1 agreement and the contents of the same whereas the grievance of the defendants is different which could only be looked into outside the scope of the suit.

14. While so, having admitted all the commitments, and in spite of knowing that even an oral agreement could be acted upon, as though Ex.A.1 is a sale deed, a decision has been arrived at by the lower appellate Court that since it is an unreliable instrument, the decision arrived at by the trial Court would go, which is not only false but erroneous. The lower appellate court has not at all adhered to the legal position as mandated under Order XL1 Rule 31 CPC. Further, the lower appellate Court has committed an illegality in holding that Ex.A.1 unregistered document cannot be looked into even for collateral purposes since according the judgments cited on the part of the learned counsel for the appellants, even unstamped and unregistered sale deeds can be looked into for collateral purposes. In these circumstances, the only decision that could be arrived at by this Court, so far as the substantial questions of law are concerned, it is to decide that the lower appellate Court is not right in i ts decision in setting aside the judgment and decree passed by the Court of District Munsif, Srivilliputhur allowing the appeal filed before it.

15. On the contrary, the trial Court has not only traced the facts and circumstances of the case in the proper perspective but also has appreciated the evidence in the manner required under law so as to arrive at the decision of granting the relief as prayed for by the plaintiff, as per its decree and judgment passed in O.S.No.4531 of 1988 dated 5.03.1990. For all the discussions held, the only conclusion that could be arrived at by this Court, adhering the substantial questions of law framed, is as under:

In result,
(i) the above second appeal succeeds and the same is allowed.

(ii) The judgment and decree dated 29.7.1992 rendered in A.S.No.40 of 1991 by the Court of Subordinate Judge, Srivilliputhur is set aside.
(iii) The judgment and decree dated 5.3.1990 rendered in O.S.No.531 of 1988 by the Court of Principal District Munsif, Srivilliputhur, is restored.
However, in the circumstances of the case, there shall be no order as to costs.

Index: Yes
Internet Yes
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To
1) The Subordinate Judge, Srivilliputhur
2) The Principal District Munsif, Srivilliputhur
3) The Record Keeper, VR Section, High Court, Madras.